No. 15700

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ENRIQUE REYES LEYVAS, *et al.*,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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Jurisdictional Statement.

This is an appeal from a judgment after conviction following trial by jury under Title 21, United States Code, Section 174. Trial was held in the United States District Court for the Southern District of California. Jurisdiction is conferred upon this Court by Title 28, United States Code, Section 1291.

Statement of Facts.

The government agrees in substance with, and incorporates herein, appellants' statement of facts with the following exceptions and additions:

On page five of their brief, appellants state that the record does not disclose what "ounce" refers to (lines

21-22). If appellants would have read further [Rep. Tr. p. 43, lines 11-12],* they would have discovered that an "ounce" was, in the words of Jose Ruiz, an "ounce of heroin." The reaction Jose Ruiz experienced after taking a "fix" from this particular "ounce" also indicates that it was heroin [Rep. Tr. p. 53, lines 10-17].

Appellants' editorial comment (App. Br. p. 13, line 24, to p. 14, line 2)** that the material reported on pages 308-366 of the Reporter's Transcript is irrelevant is not properly within the statement of the case. The relevance or irrelevance was a question for the court and the jury. The facts on those pages of the transcript reveal a portion of a course of dealing within the conspiracy, involving Jose Ruiz, William Holmes, Gilbert Quesada, Henry Ortiz, and Federal Narcotics Agent Benny Poccaroba, among others. During this particular episode, Gilbert Quesada drove Ruiz to the residence of William Pablo Holmes after Holmes had asked Ruiz on the telephone to bring him a spoon of heroin [Rep. Tr. p. 309, lines 4-23; p. 311, lines 5-9]. When Ruiz and Quesada arrived at Holmes' house, Jose Ruiz was introduced to Agent Poccaroba to whom the heroin was to be sold [Rep. Tr. p. 313, lines 9-11]. Jose Ruiz and Holmes then took "fixes" together out of the presence of Agent Poccaroba. Ruiz obtained a reaction similar to those he had experienced on previous occasions when he had taken narcotics fixes [Rep. Tr. p. 315, lines 14-25; p. 316, lines 1-2]. Then Holmes picked up the spoon of heroin in front of his house where Jose Ruiz had deposited it [Rep. Tr. p. 317, lines 5-25]. Shortly thereafter, Holmes arranged

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*Reporter's Transcript, hereinafter cited as Rep. Tr.

**Appellants' Brief, hereinafter cited as App. Br.

another purchase of heroin from Jose Ruiz for Benny Poccaroba [Rep. Tr. p. 321, lines 6-19]. The heroin was subsequently supplied to Jose Ruiz by Rudy Leyvas [Rep. Tr. p. 324, lines 18-25]. Ruiz borrowed Henry Ortiz' car to make the pick-up from Rudy Leyvas. Jose Ruiz and Henry Ortiz then delivered the heroin to Agent Poccaroba [Rep. Tr. p. 331, lines 6-10]. On a later occasion, Henry Ortiz delivered heroin to Poccaroba for Jose Ruiz while the latter watched from an automobile parked across the street [Rep. Tr. p. 361, lines 15-25; p. 362, lines 1-7]. This heroin was also obtained from Rudy Leyvas [Rep. Tr. p. 362, lines 18-25]. It is difficult to acquiesce in the appellants' opinion that this material is irrelevant. Therefore, the government adds it to the statement of facts incorporated herein.

The appellants were once again prone to editorialize on page 25 of their brief where they stated:

> "The testimony of this witness from pages 1429-1452 of the reporter's transcript involves only Louie Encinas and Armando Mendoza, along with Angel Padilla. It is scarcely relevant enough to mention." (Lines 23-26.)

This statement is obviously not part of the facts involved in this case. Furthermore, the relevance of this testimony is explained in a colloquy between government counsel and the court. The purpose of the testimony was to connect Armando Mendoza with the conspiracy through his dealings with Angel Padilla [Rep. Tr. p. 1435]. The government therefore adds this paragraph to the statement of facts to apprise the appellate court of the relevance of this particular portion of Elizabeth Ruiz' testimony.

ARGUMENT.

I.

The Finding of a Single Conspiracy Was Supported by the Evidence. The Acquittal of Certain Co-defendants, at the Close of the Government's Case and After the Close of the Trial Did Not Prejudice the Remaining Defendants-Appellants.

A. The government's theory in this case was that of a single conspiracy which encompassed all of the indicted defendants. At the outset of the case the government was fully aware of the limits imposed by *Kotteakos v. United States,* 328 U. S. 750 [Rep. Tr. p. 2231, lines 11-13], and which is heavily relied upon by appellants. In the *Kotteakos* case, the proof showed eight or more conspiracies, and the government admitted that there was more than one conspiracy (328 U. S. 750, 752). Briefly, in the *Kotteakos* case, several groups of people, independently of one another, induced lending institutions to make loans on the basis of fraudulent information. Only one man, Brown, was common to all the transactions, and each group with which he dealt had no reason to know that Brown was obtaining fraudulent loans for other groups. Each conspiracy in the *Kotteakos* case had a separate end in view and had no interest in the successes of other groups.

In the instant case, the government's theory was that those defendants who were acquitted knew they were dealing in an illegal commodity which could only be obtained outside the United States, when they purchased narcotics from Jose Ruiz, for example, and that they must have known that Ruiz received the "stuff" from someone else, to wit, the Leyvases. In other words, they knew they were

part of a larger business engaged in the distribution and sale of narcotics, and they further knew that their subsequent sales of narcotics were helping the larger scheme to prosper and grow. There may have been separate agreements, but they were all tied together [Rep. Tr. pp. 2230-2234]. This position was upheld in *Blumenthal v. United States,* 332 U. S. 539, a case which was decided subsequently to the *Kotteakos* decision. In *Blumenthal,* the gist of the conspiracy lay in the agreement to illegally sell liquor, even though the salesmen did not actually know who the owner or supplier of the liquor was. The gist of the conspiracy in the instant case lay not in who actually owned or supplied the heroin, but in the agreement to sell or dispose of it regardless of who might own it (*Blumenthal,* pp. 555-556).

Therefore, there was basis in fact and authority to support the government's position that there was one conspiracy. The fact that ten of the alleged co-conspirators were acquitted and dismissed on motion is of no avail on appeal to the remaining co-conspirators because acquittal of some co-conspirators does not necessarily prejudice the other co-conspirators. (*Lazarov v. United States,* 225 F. 2d 319, 328 (6th Cir., 1955), cert. den. 350 U. S. 886, reh. den. 350 U. S. 955; *Baxter v. United States,* 45 F. 2d 487 (6th Cir., 1930).) There was only an honest difference of opinion between the court and the government as to their respective theories of conspiracy [Rep. Tr. pp. 2230-2234; p. 3072, lines 20-22].

B. The instant case is to be distinguished from *Kotteakos v. United States* on still another important ground. In the latter case, the trial judge instructed the jury that there was only one conspiracy which they could not divide

(328 U. S. 750, 767). This instruction, in the words of Justice Rutledge:

> ". . . permeated the entire charge, indeed the entire trial . . . One . . . (effect) . . . was to prevent the court from giving a precautionary instruction such as would be appropriate, perhaps required, in cases where related but separate conspiracies are tried together . . . namely, that the jury should take care to consider the evidence relating to each conspiracy separately from that relating to each other conspiracy charged." (328 U. S. 750, 769, 770.)

In the present case, the court did not include many unconnected conspiracies within the web of one huge conspiracy, but on the contrary, under the court's theory, severed what in considered independent transactions from the conspiracy which was eventually proved and of which appellants were convicted. The court was not only able to give a precautionary instruction, but was painstaking in its admonitions to the jury to exclude the evidence concerning the acquitted defendants [see Rep. Tr. p. 2301, lines 9-25; p. 2302, lines 1-8. Also see App. Br. p. 30, line 25, to p. 31, line 5]. Such an exclusion of evidence as to the remaining defendants is presumed to preclude the possibility of prejudice to such defendants. (*United States v. Delli Paoli,* 352 U. S. 232; *United States v. Nystrom,* 237 F. 2d 218, 225 (3rd Cir., 1956).) (Exclusion of evidence relating to acquittal on certain counts.) In *Blumenthal v. United States,* 332 U. S. 539, 553, the Court in commenting on the exclusion of certain admissions as to some defendants, but inclusion as to others said:

> ". . . the trial court's rulings, both upon admissibility and in the instructions leave no room for

> doubt that the admissions were adequately excluded, insofar as this could be done in a joint trial, from considerations on their question of guilt . . . The direction was a total exclusion, not simply a partial one . . . *The court might have been more emphatic. But we cannot say its unambiguous direction was inadequate. Nor can we assume that the jury misunderstood or disobeyed it.*" (Emphasis added.)

Nor do the cases cited by appellants limit this rule in the instant case. In *Holt v. United States,* 94 F. 2d 90, 94 (10th Cir., 1937) (App. Br. p. 34, line 24), the court states that

> ". . . the testimony . . . was not *expressly* withdrawn from the jury's consideration." (Emphasis added.)

In the instant case, the trial judge expressly and emphatically withdrew the evidence regarding the acquitted defendants [Rep. Tr. p. 2304, lines 1-7; App. Br. p. 30, line 25, to p. 31, line 5].

In *Throckmorton v. Holt,* 180 U. S. 552 (App. Br. p. 34, line 10), the court only departed from the general rule because the evidence to be withdrawn was not adequately pointed out to the jury (see pp. 568 and 569).

Therefore, the government not only proved a single conspiracy of which eleven of the defendants were acquitted, but the court took all reasonable precautions to protect the appellants by giving concise and emphatic instructions to exclude all evidence which had been brought in against the acquitted defendants. The trial judge was also careful to point out that merely because he did not dismiss the appellants the jury was not to infer that he believed that the appellants were guilty [Rep. Tr. p. 2301, lines 12-25; p. 2302, lines 1-8].

II.

Error May Not Be Predicated Upon the Failure of the Trial Court to Give a Specific Instruction on the Law of Circumstantial Evidence on the Court's Own Motion When Such Instruction Was Not Requested by Appellants.

Though appellants have cited much state authority requiring a trial court to give instructions on its own motion as to the weight and effect to be given circumstantial evidence, the Federal Courts require a request whenever *any specific* instruction is desired by a defendant. (*Goldsby v. United States,* 160 U. S. 70, 77; *Gray v. United States,* 9 F. 2d 337, 339 (9th Cir., 1925); *United States v. Corry,* 183 F. 2d 155, 157 (2d Cir., 1950); *Himmelfarb v. United States,* 175 F. 2d 924, 944 (9th Cir., 1948), cert. den. 338 U. S. 860.) This rule is especially clear in the Federal courts with respect to circumstantial evidence. (*Barshop v. United States,* 191 F. 2d 286, 292 (5th Cir., 1951), cert. den. 72 S. Ct. 500; *Macaboy v. United States,* 160 F. 2d 279 (D. C. Cir., 1947); *Herman v. United States,* 48 F. 2d 479, 480 (5th Cir., 1931).) In *Tramaglino v. United States,* 197 F. 2d 928 (2d Cir., 1952), Judge Frank, at page 932, said:

> "Defendants say that a trial judge should have instructed the jury on the alibi defenses . . . and on the circumstantial nature of the evidence . . . They made no such requests, and it has been held in Goldsby v. United States, 160 U. S. 70 . . . and in Kastel v. United States, 2 Cir., 23 F. 2d 156, that these specific matters need not be mentioned in the charge without proper requests."

Since the failure to give the unrequested instruction in this case is not reversible error (*Barshop v. United States,*

supra, at p. 293), it follows that this is not a "plain error of law" within the meaning of Rule 52(b) of the Federal Rules of Criminal Procedure upon which appellants rely. Moreover, in *Macaboy v. United States, supra,* (at 280), the court noted that the states favoring this rule apply it only when a *conviction* is based *entirely* upon circumstantial evidence, and not where there is direct evidence linking the defendant with the crime. In the instant case, a reading of the record reveals a great preponderance of direct evidence vis-a-vis circumstantial evidence.

It must also be noted that the trial court instructed the jury that:

> "(t)here are two types of evidence from which a jury may properly find a defendant guilty of an offense. One is direct evidence, such as the testimony of an eye witness. The other is circumstantial evidence, the proof of a chain of circumstances pointing to the commission of the offense.
>
> "As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that, before convicting a defendant, the jury be satisfied of the defendant's guilt beyond a reasonable doubt from *all* the evidence in the case." (Emphasis added.) [Rep. Tr. p. 3002, line 21, to p. 3003, line 5.]

This instruction received the stamp of approval of the United States Supreme Court in *Holland v. United States,* 348 U. S. 121, 139-140, where a *refusal* by the trial court to give the instruction appellants in the instant case did not even request was held not to be reversible error.

III.

Courtroom Security Not Error.

Appellants' contention that the posting of marshals at the courtroom exits was prejudicial to them is equally without merit. The safeguarding of the court, counsel, jury, and spectators is best reposed in the discretion of the court. Absent any clear, incontrovertible evidence of prejudice, error may not be bottomed on this exercise of discretion. (*McDonald v. United States,* 89 F. 2d 128, 136 (8th Cir., 1937).)

IV.

There Is No Basis in Fact or in Law to Predicate Error on the Court's Refusal to Order a Daily Transcript for the Defendants.

A. A close reading of the authorities cited by appellants for the proposition that the Court had the inherent power to order a daily transcript for defendants will reveal that there were other bases for the steps taken by the courts in those cases. In *Ex parte United States,* 101 F. 2d 870, the passage quoted on page 48 of appellants' brief refers to the power of the court to render a judgment of dismissal pursuant to the reservation of a point of law. In support of this power, the court noted that the common law of England and Wisconsin authorized this procedure (101 F. 2d 870, 878). In *Ex parte Peterson,* 253 U. S. 300, the passage quoted on page 48 of appellants' brief refers to the traditional use by the court of auditors, commissioners, and special masters, to aid the court where accounts are complex and intricate (253 U. S. 300, 312). This practice clearly had its roots in Courts of Equity before this nation was founded. (*Dowell v. Superior Court,* 47 Cal. 2d 483 (App. Br. p. 51, line 23)), involved

Section 1000 of the California Code of Civil Procedure, which concerns the production of documents from the adverse party, and which is clearly not applicable in the Federal Courts.

Far more persuasive are those cases involving proceedings *in forma pauperis,* which are analogous to the issue presented herein. Recent Federal decisions indicate clearly that the granting of leave to proceed or appeal *in forma pauperis* is almost solely within the discretion of the trial court.

In *Higgins v. Steele,* 195 F. 2d 366, 367 (8th Cir., 1952), the court held that:

> "(l)eave to proceed *in forma pauperis* under 28 USCA §1915 is a privilege, not a right. *Prince v. Klune,* 148 F. 2d 18; *Dorsey v. Gill,* 148 F. 2d 857, 877. An application for leave to proceed *in forma pauperis* is addressed to the sound discretion of the court, and an order denying such an application is not a final order from which an appeal will lie . . ."

This position has been recently followed in *Parsell v. United States,* 218 F. 2d 232, 235 (5th Cir., 1955), and in *Williams v. McCulley,* 131 Fed. Supp. 162 (D. C. La., 1955).

In the instant case, the court was not convinced that the appellants could not afford the cost of a daily transcript [Rep. Tr. p. 1493, lines 9-17]. And it is difficult to understand why appellants, engaged as they were in the lucrative business of trafficking in narcotics, should be allowed to force the government to furnish them a daily transcript at the taxpayers' expense. The trial judge's suspicions as to the ability of appellants Leyvas to pay for a daily transcript were later confirmed when Counselor

Root moved to substitute herself as attorney for the Leyvases:

> "Mrs. Root: . . . we have been retained . . .
>
> The Court: Counsel, I am very much surprised at your being retained, because I am satisfied that you are not doing this from a charitable point of view, but you are being paid.
>
> You know, during the trial of this case the defendants Leyvas contended to this court that they were destitute. At one time they made a motion before this court that the court order a transcript to be presented to them because they didn't have the money to pay for a transcript. They have indicated to me all along that they couldn't afford the expense of a transcript.
>
> Now you come in at this date and you ask to be substituted. I can't understand the position that is being taken." [Rep. Tr. p. 3078, line 20, to p. 3079, line 10.]

In an effort to solve this problem, the court suggested that $1000, impounded at the time of witness William Joseph Smith's arrest, be used to pay for a daily transcript [Rep. Tr. p. 1499, lines 1-6]. This money, which William Joseph Smith alleged Enrique (Henry) Leyvas was coming to collect for past purchases of heroin, was thrown out of a window by Smith immediately before his arrest at his residence [Rep. Tr. p. 1179, line 1, to p. 1180, line 4]. The court's suggestion could not be carried out, however, because the rightful owner or owners failed to claim the money [Rep. Tr. p. 1499, lines 12-16]. In light of this evidence and the broad discretion the law gives the trial judge over this matter, appellants' allega-

tions of error in refusing the request for a daily transcript are without substance.

Moreover, it must be noted that appellants have not shown any abuse of discretion in the court's refusal to furnish them with a free daily transcript. The burden of such a showing is on the appellants. This is especially true since there are no authorities sustaining their contention, and since the trial notes of competent counsel are an effective aid in the day to day conduct of a trial. It should be further noted that appellants were given the use of the transcript for several days, without charge [Rep. Tr. p. 3079, line 24, to p. 3080, line 3].

In the present appeal those appellants who have been granted permission to proceed *in forma pauperis* have been furnished the use of a free transcript of the trial. This is all the law allows them, and it is only at this time (*i.e.,* appeal) that there is authority to give appellants a free transcript. Three of the appellants (Rudy Leyvas, Seferino Leyvas, and Lonnie (Rodriguez) who have not appealed *in forma pauperis,* and who presumably can therefore afford counsel, and who could have afforded to pay for a transcript during the trial, will now reap the full benefits of the free transcript supplied the remaining six appellants.

There is, therefore, no basis for appellants' allegations of error as to the Court's exercise of discretion on this matter.

V.

The Credibility of Jose Vasquez Ruiz Was a Question for the Jury, and the Jury's Determinations as to His Veracity Are Entitled to the Benefit of Every Doubt.

The appellants have alluded many times to Jose Ruiz' past record. As appellants' brief indicates Ruiz' record of crimes and drug addiction was brought out frequently at the trial. The jury had ample opportunity to observe Ruiz and to evaluate his testimony. It is invariably held in the Federal courts that upon appeal from a conviction, the evidence and all inferences drawn therefrom are to be viewed in the light most favorable to the government. (*United States v. Brown,* 236 F. 2d 403, 405 (2d Cir., 1956); *United States v. Lebron,* 222 F. 2d 531, 533 (2d Cir., 1955); *Fields v. United States,* 228 F. 2. 544 (4th Cir., 1955), cert. den. 350 U. S. 982; *Todorow v. United States,* 173 F. 2d 439, 442 (9th Cir., 1949), cert. den. 337 U. S. 925.) Moreover, in answer to the identical argument that appellants are now making, the court in *Dean v. United States,* 246 F. 2d 335, 336 (8th Cir., 1957), said:

> ". . . (I)t is argued that the witnesses as to these transactions were addicts . . . The questions of the credibility of the witnesses and the weight to be given this testimony were, of course, questions for the court. The jury having returned verdicts of guilty, we must assume that all conflicts in the evidence were resolved in favor of the Government, and as we have often said, the prevailing party is entitled to the benefit of all such favorable inferences as may reasonably be drawn from facts proven . . ."

Mesarosh v. United States, 352 U. S. 1, upon which appellants rely has no application here, because in *Mesarosh* the government actually discovered that the testimony of a government witness in that trial was untruthful. Here, there is no such showing, and to say that Ruiz' testimony is tainted is only to state a conclusion without proof. Under these circumstances, all questions of credibility in the instant case should be resolved in favor of the jury's findings.

Conclusion.

1. A single conspiracy was alleged and proved by the Government.

2. The evidence regarding the acquitted co-defendants was excluded by a precautionary instruction which precluded any prejudice to appellants.

3. The trial court correctly instructed the jury as to the burden of proof as required by Federal practice and was not required on its own motion to give any specific instruction as to the nature of circumstantial evidence.

4. The posting of marshals at the exits was solely within the court's discretion, and must be presumed to have been reasonably necessary for the safety of the court, counsel, jury, and spectators and to maintain custody of the 20 odd defendants, some of whom were part of a million dollar narcotics ring.

5. The request for a daily transcript at the expense of the government was properly denied by the trial judge. There is no authority for the granting of such relief, and because it can be inferred that the court had reason to believe the appellants Leyvas could have paid for such transcript.

6. The credibility of Jose Vasquez Ruiz was a question for the jury, and it cannot be assumed that his testimony was tainted.

Wherefore, the Government prays the Judgments of Conviction be affirmed.

Respectfully submitted,

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